WOOLLEY DEVELOPMENT SDN BHD v. TIARA CONTOURS CONSTRUCTION SDN BHD

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: P-02-2163-10-2013]
1 JULY 2015

TRUSTS: *Land – Creation of trust – Constructive trust – Allegation that third party held property on trust for purchaser – Whether trust property in existence when trust supposed to have arisen – Whether third party acquired ownership of trust property – Whether third party acted unconscionably to deprive purchaser of trust property – Whether constructive trust arose*

CONTRACT: *Privity – Sale and purchase agreement ('SPA') – Execution of SPA of subject property in satisfaction of debt due to purchaser by vendor – Subject property subsequently transferred to third party – Whether third party privy to SPA – Whether third party successor-in-title to vendor – Whether SPA enforceable against third party*

Cherating Development Sdn Bhd ('Cherating'), a developer and registered proprietor of a piece of land ('the land'), sought to develop a commercial project. The main contractor for the project, Syarikat Pembinaan Chan & Chua, appointed the respondent ('plaintiff') as the sub-contractor. However, the development was unsuccessful and thereafter the construction ceased. Pursuant thereto, Cherating, the main contractor and the plaintiff entered into a 'memorandum of agreement' ('the settlement agreement') in partial satisfaction of debts owed by, *inter alia*, Cherating to the main contractor and the main contractor to the plaintiff. The settlement agreement provided that in full and final satisfaction of the debt owed to the plaintiff by the main contractor, Cherating would execute a sale and purchase agreement ('SPA') in favour of the plaintiff in respect of one ground floor unit of shop-office in the project ('the proposed unit'), without requiring any actual payment from the plaintiff. As at the date of the settlement agreement, the proposed unit had not been constructed and the land remained charged to Malaysia Building Society Bhd ('MBSB'), as security for a loan granted to Cherating. Simultaneously with the execution of the settlement agreement, Cherating and the plaintiff entered into the SPA. However, the building was never constructed and the appellant ('second defendant') was invited to rehabilitate and complete the abandoned project. The second defendant entered into a transfer agreement with Cherating to transfer the land to the second defendant with the express consent of MBSB as the chargee. Nevertheless, the transfer of the land was never effected and thus, the land remained in the name of Cherating and remained charged to MBSB. Subsequently, the second defendant sold the land to third party purchasers. The plaintiff thus sought

to enforce the SPA against the second defendant on the grounds (i) that the second defendant was a constructive trustee holding the land on trust for the plaintiff; and (ii) alternatively, the second defendant was a successor-in-title to Cherating and was therefore effectively bound by the terms of the SPA. The High Court decided in favour of the plaintiff and hence, the appeal by the second defendant. The issue raised was on the question of enforceability of the SPA entered into between a vendor and purchaser as against a third party.

Held (allowing appeal; setting aside decision of High Court)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) A constructive trust is a creation of the law, which comes into existence to hold the recipient or transferee of trust property liable to the beneficial owner as a 'constructive trustee'. Hence, there must be a trust property in existence in the first place for a constructive trust to arise by operation of law. In this case, the proposed unit, comprising the subject matter of the 'trust', was not in existence at the point in time when a trust was supposed to have arisen. The property had not been constructed at the point in time when Cherating, its main contractor and the plaintiff entered into the settlement agreement and the SPA. (paras 27-30)

(2) It is necessary for the second defendant to have acquired ownership of the proposed unit from Cherating for a constructive trust to arise. However, the property remained a part of land registered in the name of Cherating, as Cherating never transferred ownership of the land to the second defendant. The land also remained charged to MBSB. Hence, an essential element necessary to justify the subsistence of a constructive trust was missing. (para 33 & 35)

(3) The second defendant did not take any step to actively deprive the plaintiff of ownership of the proposed unit because there was no evidence to suggest that the second defendant acted unconscionably. Therefore, it was not possible for a constructive trust to have arisen or for the second defendant to be deemed a constructive trustee in law as there was no 'unlawful' conduct on the part of the second defendant calculated to deprive the plaintiff of the proposed unit. (paras 36 & 37)

(4) As the land was encumbered with the charge against MBSB, it was not possible for Cherating to dispose of a portion of the land to any third party such as the plaintiff. In the circumstances, a trust could not have arisen because Cherating could not sell or pass ownership to any third party without the express consent of the chargee, MBSB. (para 39)

(5) The settlement agreement as well as the SPA did not create interest in land in favour of the plaintiff, whereby beneficial ownership of the proposed unit passed from Cherating to the plaintiff. On the contrary,

the contracts were a means of settlement of a debt due and owing from the main contractor to the plaintiff, which debt was undertaken by Cherating. Hence, the contracts amounted to a promise by Cherating to repay the plaintiff the debt owed to it, by way of giving the plaintiff the proposed unit. As Cherating had failed to make good its promise to repay the plaintiff, the plaintiff's recourse was against Cherating for breach of contract. (paras 40-42)

(6) The second defendant was not privy to either the settlement agreement or the SPA and, as the land was never transferred to it, the second defendant was not the successor-in-title to Cherating. In the circumstances, there was no basis on which the plaintiff could seek to enforce the SPA against the second defendant. (paras 38 & 50)

Bahasa Malaysia *Headnotes*

Cherating Development Sdn Bhd ('Cherating'), pemaju dan pemilik berdaftar sebidang tanah ('tanah tersebut') bertindak membangunkan satu projek komersial. Kontraktor utama projek tersebut, Syarikat Pembinaan Chan & Chua, melantik responden ('plaintif') sebagai sub-kontraktor. Walau bagaimanapun, pembangunan tersebut tidak berjaya dan pembinaannya terhenti. Berikutan itu, Cherating, kontraktor utama dan plaintif memasuki memorandum perjanjian ('perjanjian penyelesaian') untuk melangsaikan sebahagian hutang tertunggak oleh, antara lain, Cherating kepada kontraktor utama dan oleh kontraktor utama kepada plaintif. Perjanjian penyelesaian memperuntukkan, sebagai penyelesaian penuh dan muktamad kesemua hutang kepada plaintif oleh kontraktor utama, Cherating akan memeterai satu perjanjian jual beli ('PJB') bagi pihak plaintif berkaitan dengan satu unit tingkat bawah kedai pejabat dalam projek tersebut ('unit yang dicadangkan'), tanpa memerlukan apa-apa bayaran sebenar daripada plaintif. Pada tarikh perjanjian penyelesaian, unit yang dicadangkan belum dibina dan tanah tersebut kekal tergadai pada Malaysia Building Society Bhd ('MBSB'), sebagai jaminan bagi pinjaman yang diberikan kepada Cherating. Bersama-sama dengan pemeteraian perjanjian penyelesaian, Cherating dan plaintif memasuki PJB. Tetapi, apabila bangunan tersebut tidak dibina, perayu ('defendan kedua') dilantik untuk memulihkan dan menyelesaikan projek yang terbengkalai itu. Defendan kedua memasuki perjanjian pindah milik dengan Cherating untuk memindah milik tanah tersebut kepada defendan kedua dengan persetujuan langsung oleh MBSB sebagai pemegang gadaian. Walau bagaimanapun, pindah milik tanah tersebut tidak berlaku dan oleh itu, tanah tersebut kekal dalam nama Cherating dan kekal tergadai pada MBSB. Kemudian, defendan kedua menjual tanah tersebut kepada pembeli pihak ketiga. Plaintif oleh itu memohon untuk menguatkuasakan PJB terhadap defendan kedua atas alasan bahawa (i) defendan kedua adalah pemegang amanah konstruktif yang memegang tanah secara amanah bagi pihak plaintif; dan (ii) secara alternatifnya, bahawa defendan kedua adalah pewaris hak milik Cherating dan oleh itu terikat dengan terma-terma PJB.

A Mahkamah Tinggi memutuskan memihak kepada plaintif dan dengan itu, rayuan oleh defendan kedua. Isu yang dibangkitkan adalah atas persoalan penguatkuasaan PJB yang dimeterai antara penjual dan pembeli terhadap pihak ketiga.

B **Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)**

Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

C **(1)** Amanah konstruktif dibentuk oleh undang-undang, dan wujud untuk menjadikan penerima harta amanah bertanggungan kepada pemilik benefisial sebagai pemegang amanah konstruktif. Oleh itu, harta amanah perlu wujud terlebih dahulu untuk membolehkan amanah konstruktif berbangkit melalui operasi undang-undang. Dalam kes ini, unit yang dicadangkan yang membentuk perkara 'amanah' tidak wujud pada masa amanah sepatutnya berbangkit. Hartanah tersebut belum dibina pada
D masa Cherating, kontraktor utamanya dan plaintif memasuki perjanjian penyelesaian dan PJB.

(2) Perlu bagi defendan kedua memperoleh milikan unit yang dicadangkan daripada Cherating bagi amanah konstruktif berbangkit. Walau bagaimanapun, dalam kes ini, hartanah tersebut kekal sebagai
E sebahagian tanah yang didaftarkan atas nama Cherating, kerana Cherating tidak pernah memindah milik tanah tersebut kepada defendan kedua. Tanah tersebut juga masih dalam gadaian MBSB. Oleh itu, unsur penting untuk mewajarkan pengekalan amanah konstruktif tidak wujud.

F **(3)** Defendan kedua tidak mengambil apa-apa langkah aktif untuk menafikan plaintif milikan unit yang dicadangkan kerana tiada keterangan yang menunjukkan defendan kedua bertindak secara tidak berpatutan. Oleh itu, tidak mungkin amanah konstruktif berbangkit atau defendan kedua dianggap pemegang amanah konstruktif di sisi undang-
G undang kerana tiada tindakan menyalahi undang-undang oleh defendan kedua yang menafikan plaintif unit yang dicadangkan.

(4) Oleh sebab tanah tersebut dibebani dengan gadaian oleh MBSB, tidak mungkin Cherathing boleh melupuskan sebahagian tanah kepada mana-mana pihak ketiga seperti plaintif. Dalam hal keadaan tersebut, amanah
H tidak mungkin berbangkit kerana Cherating tidak boleh menjual atau memindah milikan kepada mana-mana pihak ketiga tanpa persetujuan jelas pemegang gadaian, MBSB.

(5) Perjanjian penyelesaian dan PJB tidak membentuk kepentingan dalam tanah bagi pihak plaintif, di mana milikan benefisial unit yang
I dicadangkan boleh dipindahkan daripada Cherating kepada plaintif. Sebaliknya, kontrak-kontrak tersebut adalah cara menyelesaikan hutang tertunggak oleh kontraktor utama kepada plaintif, yang mana diakujanji

oleh Cherating. Oleh itu, kontrak-kontrak tersebut membentuk perjanjian oleh Cherating untuk membayar balik kepada plaintif, hutang tertunggak, dengan cara memberikan kepada plaintif unit yang dicadangkan. Oleh sebab Cherating gagal memenuhi perjanjian untuk membayar balik plaintif, remedi plaintif adalah terhadap Cherating kerana kemungkiran kontrak.

(6) Defendan kedua bukan pihak dalam perjanjian penyelesaian atau PJB, dan, oleh sebab tanah tersebut tidak pernah dipindah milik kepadanya, defendan kedua bukan pewaris hak milik kepada Cherating. Dalam hal keadaan itu, tiada alasan bagi plaintif memohon untuk menguatkuasakan PJB terhadap defendan kedua.

Case(s) referred to:
Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors [2011] 1 LNS 440 CA ***(refd)***
Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***
Woolley Development Sdn Bhd v. Mikien Sdn Bhd [2008] 2 CLJ 303 CA ***(dist)***
Woolley Development Sdn Bhd v. Stadco Sdn Bhd [2010] 7 CLJ 73 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 81

For the appellant - Gan Techiong; M/s Gan & Lim
For the respondent - Neoh; M/s BC Teh & Yeoh

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-480-2006 (overruled)]

Reported by S Barathi

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This appeal raises the question of the enforceability of a sale and purchase agreement, entered into between a vendor and purchaser, as against a third party. The third party had, subsequent to the original sale and purchase agreement between the purchaser and vendor, entered into a separate agreement for a transfer of land with the vendor. In these circumstances, the purchaser under the sale and purchase agreement sought to enforce the sale and purchase agreement against the third party.

[2] The purchaser's ground for seeking such enforcement was that the third party was a constructive trustee that held the subject property on trust for the purchaser, as the purchase price had been cleared to be paid in full. Alternatively, it was contended that the third party was the 'successor-in-title' to the vendor and was therefore effectively bound by the terms of the sale and purchase agreement.

[3] As such, this appeal raises issues relating to the law of trusts and privity of contract.

A **Salient Background Facts**

[4] Cherating Development Sdn. Bhd. ('Cherating') who was the first defendant in the court below, was a developer and remains the registered proprietor of land in Seberang Perai known as Lot No. 1964, Seksyen 3 Seberang Perai Utara, Pulau Pinang[1] ('the land').

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[5] Cherating had, in or around 1997 sought to develop a commercial project on the land known as the 'Raja Uda Commercial Centre' ('the project'). The main contractor for the project was one Syarikat Pembinaan Chan & Chua Sdn Bhd. It appointed the respondent (the plaintiff in the court below) as the sub-contractor for the project.

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[6] The respondent will be referred to as the plaintiff and the appellant as the second defendant, as they were in the court below.

[7] The development of the project by Cherating proved unsuccessful as it had insufficient funds to pay the main contractor. As a consequence, construction ceased sometime prior to 2000.

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[8] It is not in dispute that by reason of these events, Cherating owed the main contractor monies, and the main contractor in turn, owed the plaintiff the sum of RM262,500 (two hundred and sixty-two thousand and five hundred ringgit). In partial satisfaction or compromise of this debt, three parties, namely Cherating, the main contractor and the plaintiff (as sub-contractor) entered into a 'Memorandum of Agreement' dated 21 January 2000 ('the settlement agreement').

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The Settlement Agreement (Between Cherating, The Main Contractor And The Plaintiff)

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[9] By the terms of this settlement agreement, Cherating acknowledged that it was indebted to the main contractor and the main contractor acknowledged that it was indebted to the plaintiff in the said sum of RM262,500. The settlement agreement effectively provided that in full and final satisfaction of the debt of RM262,500 owed to the plaintiff by the main contractor, Cherating would execute a sale and purchase agreement in favour of the plaintiff in respect of one ground floor unit of shop-office in the project, without requiring any actual payment from the plaintiff. The plaintiff was in effect setting off the debt of RM262,500 owed by the main contractor who in turn set-off the debt due from Cherating.

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[10] At the date of this settlement agreement, this unit had not been constructed. Neither had separate strata titles been issued to the entirety of the property by the authorities. It is relevant that the land was, at the time of the settlement agreement, and still remains charged to Malaysia Building Society Berhad, as security for a loan granted to Cherating.

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[11] An express term of the settlement agreement provided that Cherating confirmed and acknowledged that the purchase price for the unit was deemed to have been settled in full by the plaintiff upon execution of a sale and purchase agreement.

[12] It was also an express term of the settlement agreement that it "shall be binding upon the heirs, personal representatives, successors-in-title and assigns of the parties hereto."

The Sale And Purchase Agreement

[13] Simultaneously with the execution of the settlement agreement, Cherating and the plaintiff entered into a sale and purchase agreement dated 21 January 2000 whereby in consideration of the settlement as arrived at between the parties, Cherating as vendor sold the ground floor shop-office unit to the plaintiff for the purchase price of RM262,500. Cherating confirmed and acknowledged that the purchase price was deemed to have been settled in full upon execution of the sale and purchase agreement.

[14] Pursuant to cl. 8(a) of the sale and purchase agreement, Cherating was to construct and deliver to the plaintiff the ground floor unit of shop-office identified as Plot 513 Unit 83A with a built up area of 104.9 square metres ('the proposed ground floor unit').

[15] However, the building was never constructed as Cherating failed to complete the project. It was therefore in breach of the sale and purchase agreement. The project was abandoned. The proposed ground floor unit was not built.

The Transfer Agreement (Between Cherating And The Second Defendant With The Consent Of The Chargee, Malaysia Building Society Berhad)

[16] Malaysia Building Society Berhad, the chargee of the land, invited the second defendant to rehabilitate and complete the abandoned project. To facilitate this, the second defendant entered into a transfer agreement with Cherating on 20 September 2000 for, *inter alia*, the transfer of the land to the second defendant ('transfer agreement'). This was necessarily done with the express consent of Malaysia Building Society Berhad, as chargee.

[17] As of the year 2000, the outstanding amount owed by Cherating to Malaysia Building Society Berhad was in the region of about RM170 million. The idea was that the second defendant would rehabilitate the project, and pay out the redemption sums to redeem the lands from the chargee. The transfer agreement was not a gratuitous transfer.

Terms Of The Transfer Agreement

[18] The preamble to the transfer agreement provided that Cherating had made separate and individual sale and purchase agreements with individual purchasers, the details of which were described in Annexure H. These sale and purchase agreements were not assigned to the second defendant.

[19] Instead, it was a condition precedent under cl. 4.1(e) of the transfer agreement that novation agreements would be entered into with the purchasers described in Annexure H. This meant that the second defendant would step into the shoes of Cherating in relation to those particular sale and purchase agreements. However the plaintiff's name did not appear in Annexure H. As such, Cherating had not acknowledged the plaintiff as an individual purchaser, notwithstanding that it had entered into a sale and purchase agreement with the plaintiff.

Transfer Agreement Not Performed

[20] In any event, the transfer of the land as envisaged under the transfer agreement was never effected, as Cherating was unable to remove existing encumbrances on the land. As such, the land remains in the name of Cherating to this day. It also remains charged to Malaysia Building Society Berhad.

[21] By virtue of the foregoing, it is evident that the second defendant was not privy to the sale and purchase agreement between the plaintiff and Cherating. Equally, the plaintiff was not privy to the transfer agreement between Cherating and the second defendant.

[22] The plaintiff, in an effort to safeguard its claim in respect of the proposed ground floor unit, lodged a caveat on the land. This caveat was expressly identified by the second defendant in the transfer agreement executed with Cherating.

[23] The second defendant subsequently sold the land on which the unit promised to the plaintiff was to be built, to third party purchasers. The plaintiff then instituted a suit in the High Court seeking specific performance of the sale and purchase agreement against Cherating and/or the second defendant. Alternatively, the plaintiff sought damages in the sum of RM262,500 against both defendants.

[24] However, at the commencement of trial the plaintiff withdrew its claim against Cherating on the ground that it had been wound up. As such, Cherating is not a party to this appeal. The trial proceeded against the second defendant only.

The Decision of the High Court

[25] In summary, in the court below the learned judge of the High Court found that:

(i) Cherating held the property as a bare trustee for the plaintiff;

(ii) the second defendant was guilty of 'knowing receipt' of the property being trust property held for the benefit of the plaintiff;

(iii) accordingly, the second defendant was a constructive trustee of the property, as it had actual knowledge that the property was trust property;

(iv) as such, the learned judge concluded that the second defendant was liable to the plaintiff as a constructive trustee, and had to restore the property to the plaintiff or pay damages;

(v) alternatively, the second defendant was liable to the plaintiff as successor-in-title to Cherating within the meaning of two clauses in the contract between the plaintiff and Cherating. These clauses provided that the sale and purchase agreement would be binding on successors-in-title to the parties; and

(vi) the learned judge concluded that the successor clauses placed the second defendant in the shoes of Cherating, thereby making it liable to the plaintiff for the property or its value.

The Decision Of The Court Of Appeal

[26] On 17 September 2014, we heard this appeal and unanimously allowed the same, awarding costs of RM40,000 to the appellant. The reasons for our decision are set out below.

Analysis

Could A Constructive Trust Arise In Law?

No Certainty Of Subject Matter

[27] The learned judge found at the outset of his judgment that the plaintiff had successfully established that the second defendant was liable as a constructive trustee to the plaintiff in respect of the proposed ground floor unit. However, the proposed ground floor unit, comprising the subject matter of the 'trust', was not in existence at the point in time when a trust was supposed to have arisen.

[28] This is because the property had not been constructed at the point in time when Cherating, its main contractor and the plaintiff entered into the settlement agreement and the sale and purchase agreement. In other words, there was no subject matter from which the existence of a trust, constructive or otherwise, could be inferred.

[29] The learned judge concluded that as both the settlement agreement and the sale and purchase agreement provided that payment for the proposed ground floor unit was deemed to have been paid in full, Cherating then held the property as bare trustee for the plaintiff. However in so concluding, the learned judge failed to recognise that the said unit was not in existence. In other words, the subject matter of the proposed trust was not in existence. In fact it never came into being as it was never constructed. The plaintiff's witness confirmed this fact in the course of cross-examination. The plaintiff as the sub-contractor of the project would have had knowledge of the fact of non-completion of the property.

[30] A constructive trust is a creation of the law, which comes into existence to hold the recipient or transferee of trust property liable to the beneficial owner as a 'constructive trustee'. It is however clear beyond dispute that there must have been trust property in existence in the first place for a constructive trust to arise by operation of law.

[31] In *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949; [2014] 4 MLJ 64 the Federal Court defined a constructive trust as follows:

> … [32] A trust is an obligation enforceable in equity, which rests on a person as owner of some property, for the benefit of another or for the advancement of certain purposes …
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> [38] From the various opinions above it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another.

The Second Defendant Is Not The Owner Of The Proposed Ground Floor Unit

[32] The learned judge had then concluded that the second defendant by acquiring the proposed ground floor unit through the transfer agreement, had done so unlawfully or unconscionably, and therefore the second defendant held or owned the proposed ground floor unit as constructive trustee. In other words, he inferred the existence of a constructive trust in law.

[33] However once again, an essential element necessary to justify the subsistence of a constructive trust was missing. The second defendant is not, and was not, the owner of the proposed ground floor unit at any time.

[34] For a constructive trust to arise, it would have been necessary for the second defendant to have acquired ownership of the proposed ground floor unit from Cherating. It would also have been necessary for the second defendant to have acted wrongfully so as to deprive the plaintiff of ownership of the proposed ground floor unit, making it unconscionable for the second defendant to assert its beneficial interest in the property and deny the beneficial interest of the plaintiff. But that is plainly not the case here.

[35] The property remains a part of the land registered in the name of Cherating, as Cherating never transferred ownership of the land to the second defendant. The land also remains charged to Malayan Building Society Berhad. In other words, another essential element for the subsistence of a constructive trust, namely that the property be owned or acquired by the second defendant, simply did not exist.

No Unconscionable Conduct On The Part Of The Second Defendant

[36] The second defendant did not also take any steps to actively deprive the plaintiff of ownership of the proposed ground floor unit because there is no evidence to suggest that the second defendant acted unconscionably.

[37] It is therefore not possible for a constructive trust to have arisen, or for the second defendant to be deemed a constructive trustee in law as there was no 'unlawful' conduct on the part of the second defendant calculated to deprive the plaintiff of the proposed ground floor unit.

[38] This is because the second defendant was not privy to either the settlement agreement or the sale and purchase agreement. Neither was the second defendant the successor-in-title to Cherating because the land was never transferred to it.

The Land Remains Charged To Malayan Building Society Berhad

[39] Another reason why a constructive trust cannot be inferred in law in these circumstances is that the land on which the proposed ground floor unit was to be constructed remains charged to Malayan Building Society Berhad. As the land was encumbered with this charge, it was not possible for Cherating to dispose of a portion of the land, comprising the proposed ground floor unit, to any third party such as the plaintiff here. A trust could not have arisen because Cherating could not sell or pass ownership to any third party without the express consent of the chargee, Malayan Building Society Berhad.

The Settlement Agreement And The Sale And Purchase Agreement

[40] When the settlement agreement as well as the sale and purchase agreement are considered in the context of this factual matrix, it is apparent that these contracts did not in fact create an interest in land in favour of the plaintiff, whereby beneficial ownership of the proposed ground floor unit passed from Cherating to the plaintiff.

[41] On the contrary, the contracts were a means of settlement of a debt due and owing from the main contractor to the plaintiff, which debt was undertaken by Cherating. Cherating proposed to repay this debt by passing ownership of a yet to be built unit to the plaintiff. In other words, these contracts amounted to a promise by Cherating to repay the plaintiff the debt owed to it, by way of giving the plaintiff the proposed ground floor unit. In consideration of the foregoing, the plaintiff agreed to forgo its entitlement to the sum of RM262,500 being monies owed to it for works done in its capacity as sub-contractor.

[42] As Cherating had failed to make good its promise to repay the plaintiff by transfer of a ground floor unit, the plaintiff's recourse is against Cherating for breach of contract. As such, the plaintiff's remedy against Cherating is in damages, given the fact that specific performance is not possible.

[43] But these contracts, ie, the settlement agreement and the sale and purchase agreement did not and could not create an interest in land capable of being transferred or becoming the subject matter of a trust.

[44] For the foregoing reasons, we concluded the learned judge erred in concluding that Cherating held the proposed ground floor unit on trust for the plaintiff, or that the second defendant unlawfully acquired the said unit as constructive trustee.

Successor-In-Title

[45] The learned judge made an alternative ruling in his judgment. He found that the second defendant is a successor-in-title of Cherating, and as such is liable to the plaintiff for performance of the sale and purchase agreement. In so doing, the learned judge based his finding on cl. 13 of the sale and purchase agreement as well as cl. 10 of the settlement agreement and referred to them collectively as the 'successor clauses'.

[46] The said clauses provide that each of those agreements is binding on the "… heirs, personal representatives, successors in title and assigns of the parties hereto."

[47] If Cherating had transferred ownership of the land to the second defendant and if the sale and purchase agreement had been listed in Annexure H and become the subject matter of a novation, then it is arguable that the second defendant became the successor-in-title to Cherating. However that is not happened here.

[48] The land was not transferred to the second defendant. Cherating remains the registered proprietor of the land. So cl. 10 of the settlement agreement does not take effect. The second defendant is not therefore the successor-in-title to Cherating. (Even if the lands had been transferred to the second defendant, it would still have remained encumbered by the charge in favour of the Malayan Building Society Berhad.)

[49] Neither was the plaintiff's sale and purchase agreement the subject matter of novation as it is not listed in Annexure H. As such, the second defendant did not step into the shoes of Cherating in this context either.

[50] In other words, the second defendant is not privy to the sale and purchase agreement. As there was no novation of the said agreement whereby the second defendant stepped into the shoes of Cherating, there is no basis on which the plaintiff can seek to enforce the sale and purchase agreement against the second defendant. There is simply no privity of contract between the two.

[51] In these circumstances we concluded that the learned judge had erred in finding that the second defendant is the successor-in-title of Cherating.

The Doctrine Of Privity Of Contract

[52] The decision of the Court of Appeal in *Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors* [2011] 1 LNS 440; [2011] 5 MLJ 820 illustrates and expounds the doctrine of privity of contract comprehensively. In that case the plaintiff there had sued Bacom Enterprise Sdn Bhd ('Bacom') on the basis of a development agreement made between Bacom and the registered proprietors of some lands. The plaintiff was not a party to the development agreement but he was mentioned there as being the holder of an earlier power of attorney for those lands. The High Court allowed the plaintiff's claim against Bacom. The decision was reversed by this court where it was stated, *inter alia*, as follows:

> … The plaintiff is definitely not a party to the sale agreement and hence cannot enforce or rely for protection on its provisions even if some provision therein was intended to benefit him. In *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446, which dealt with the English position on the doctrine of privity, Lord Reid said (at pp 472-473):
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> > In considering the various arguments for the appellants, I think it is necessary to have in mind certain established principles of English law of contract. Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of the provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him. That rule appears to have been crystallised a century ago in *Tweddle v. Atkinson* [1861] 1 B & S 393) and finally established in this House in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1915] AC 847.
>
> [102] In *Kepong Prospecting Ltd & Ors v. Schmidt* [1968] 1 MLJ 170, the Privy Council held that the doctrine of privity applies in Malaysia.

And further down at pp. 866 to 867:

> … This would of course be in line with the doctrine of privity. The doctrine is clear. A non-party cannot bring an action on the contract. A person not a party to a contract cannot enforce or rely for protection on its provisions. The rule of privity relates to who can enforce the contract. The doctrine of privity is clearly illustrated in Pollock & Mulla on *Indian Contract & Specific Relief Acts* (12th Ed), Vol 1 at pp 25-26; it reads:
>
> > **Two aspects of the Doctrine**
> >
> > The doctrine has two aspects. The first aspect is that no one but the parties to the contract is entitled under it. Contracting parties may confer rights and benefits upon a third party in the form of promise to pay, or to perform a service, or a promise not to sue (at all or in circumstances covered by an exclusion or limitation clause). But the third party on whom such right or benefit is conferred by contract can neither sue under it nor can rely on defences based on the contract.

> The second aspect of the doctrine is that parties to a contract cannot impose liabilities on a third party. A person cannot be subject to the burden of a contact to which he is not a party. It is the counterpart of the proposition that a third party cannot acquire rights under a contract. This rule, for example, also bars a person from being bound by an exemption clause contained in a contract to which it is not a party, so that a contract between A and B cannot impose a liability on C.
>
> **Justification for the Doctrine**
>
> The rule of privity has been justified on a number of grounds. First, it is unjust to enable a third party to sue on the contract and not be liable for it. Secondly, enabling third parties to enforce contracts would affect or limit the rights of contracting parties to vary or terminate the contract.'…

[53] In the instant case, the second defendant was not party to, nor privy to the sale and purchase agreement which was concluded between the plaintiff and Cherating. As such, the plaintiff could not seek to enforce the settlement agreement against a non-party, namely the second defendant. The successor-in-title clause did not have the effect of allowing the second defendant to step into the shoes of Cherating for the reasons cited above. Accordingly it was not possible for the plaintiff to seek to enforce the sale and purchase agreement or the settlement agreement against the second defendant, who was a stranger to both agreements.

Other Decisions Of This Court

[54] In the course of argument before us, learned counsel for the respondent relied on the case of *Woolley Development Sdn Bhd v. Mikien Sdn Bhd* [2008] 2 CLJ 303 ('*Mikien*'s case') where by a majority, this court upheld a summary judgment granted pursuant to O. 81 RHC 1980 on similar facts. In the majority judgment it was held, *inter alia*, as follows:

> … It is noted, as submitted by learned counsel for the plaintiff, that the second defendant had never disputed that they are the successors in title and the permitted assigns of the first defendant. Thus, by virtue of cll. 41 and 38(f), the SPA is binding on the second defendant.

[55] In that case the primary reason for holding that the sale and purchase agreement was binding on the second defendant was due to the second defendant's failure to deny or dispute a positive averment by the plaintiff, Mikien that the second defendant was the successor-in-title and permitted assign of Cherating.

[56] However in the instant case during the trial of this matter, the second defendant had unequivocally disputed the allegation that it was the successor-in-title of Cherating.

[57] It is also significant to note that in the majority judgment in *Mikien*'s case there was no consideration accorded to the fact that Cherating's land were not transferred to the second defendant and that those lands remained charged to Malayan Building Society Berhad.

[58] We would however, with respect, concur with the dissenting judgment in *Mikien*'s case where Zaleha Zahari JCA held that there were issues to be tried and refused summary judgment. In the dissenting judgment it was pointed out that the mere fact that the transfer agreement had been executed between Cherating and the second defendant did not, *per se* make the second defendant jointly and severally liable to the plaintiffs (there) for breaches committed by Cherating in the first instance. Further, the non-listing of the plaintiffs (in that action) in Annexure H, as well as the fact that there was no novation of the agreement as envisaged by the transfer agreement clearly showed, that it had an impact on the issue of whether the second defendant was liable to a purchaser such as the plaintiffs there.

[59] In the instant case, at the conclusion of trial it is our considered view that there was no basis for the plaintiff to seek a remedy against the second defendant as:

(a) The transfer agreement was never performed, and the land/property never passed to the second defendant;

(b) Cherating remains the registered proprietor with Malayan Building Society Berhad as the chargee;

(c) The sale and purchase agreement between the plaintiff and Cherating was not listed in Annexure H and was not novated so as to place the second defendant in the shoes of Cherating; and

(d) As such the plaintiff could not seek recourse against a stranger to the sale and purchase agreement as well as the settlement agreement, namely the second defendant.

[60] In *Woolley Development Sdn Bhd v. Stadco Sdn Bhd* [2010] 7 CLJ 73; [2011] 6 MLJ 121 this court reversed the decision of the High Court which had granted an injunction restraining, *inter alia*, Woolley Development from dealing with some lands forming the subject matter of 192 sale and purchase agreements made between the plaintiff there and Cherating. In setting aside the interlocutory injunction this court held, *inter alia*, that as there was never any contract between the second defendant there, namely Woolley Development and the plaintiff there. As stated in that case:

> … In basic legal terms, there was never in existence any privity of contract between them.

[61] In these circumstances, we were satisfied that the second defendant could not and was not a successor-in-title to Cherating, and could not therefore be held liable to the plaintiff for the breaches occasioned by Cherating.

[62] As the second defendant is neither a constructive trustee in relation to the proposed ground floor unit, nor privy to, or a successor-in-title to the sale and purchase agreement between the plaintiff and Cherating, we concluded that the appeal be allowed and the decision of the High Court be set aside.

Endnotes:

1. Previously known as Lot Nos. 347, 198, 784, 786, 788, 565, 1961, 1116, 6, 190, 5, 4509, 4510 & 4511, Seksyen 3, Seberang Perai Utara, Pulau Pinang.